Supreme Court, U.S.
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NO. 90-1490

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE CELOTEX CORPORATION,
Petitioner,

v.

LLOYD D. KING, LOUAN KING, A. B. WILLIS, MOLLY WILLIS, CLETUS GRESHAM, LARRY JONES, BESS JONES, JOHNNY FOWLER and MARY MARBLE, Individually and as Representative for the Estate of ALBERT L. MARBLE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

PAUL L. SADLER
Counsel of Record

REX HOUSTON
WELLBORN, HOUSTON, ADKISON, MANN, SADLER & HILL
300 West Main Street
Henderson, Texas 75652
903/657-8544

Attorneys for Respondents

Alpha Law Brief Co. — 6113 Aletha Lane — Houston, Texas 77081 — 789-2000

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Texas Constitution and the Texas common law provide sufficient due process safeguards for the imposition of a punitive damage award because:

   a. The assessment of punitive damages in the asbestos litigation relates to specific individual harm and Texas law has adopted specific standards for the imposition and review of the award;

   b. The Texas Constitution, common law and gross negligence provide specific criteria which fairly apprised Celotex that its conduct would subject it to punishment; and

   c. Texas courts have adopted traditional common law standards which were thoroughly applied to this award by the District Court and the Fifth Circuit Court of Appeals.

2. Whether an unambiguous, unequivocal admission of a disputed fact by counsel, adverse to the interest of the client, and the utilization of the same evidence by Celotex to prove its claim for contribution constitutes a judicial admission.

PARTIES TO THE PROCEEDING

PETITIONERS:

The Celotex Corporation
Carey Canada, Inc., wholly owned subsidiary
The Jim Walter Corporation, parent corporation

RESPONDENTS:

Lloyd D. King
Louan King
A. B. Willis
Molly Willis
Cletus Gresham
Larry Jones
Bess Jones
Johnny Fowler
Mary Marble

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GROUNDS FOR JURISDICTION

The United States Court of Appeals entered an Order on July 12, 1990, affirming the decision of the district court. The United States Court of Appeals denied a

Petition for Rehearing on August 31, 1990. Petitioners attempted to file this Petition on February 19, 1991, but the Petition was rejected as non-timely by the Clerk of this Court. *See* Appendix A. Respondents contend that the Petition was not timely filed because it should have been filed on or before November 29, 1990, which was ninety days after the denial of rehearing. Rule 13.4 of the Rules of the Supreme Court and 28 U.S.C. § 2101(c). At the request of the Clerk, letter briefs of the parties have been submitted on this issue. (A copy of the letter brief filed by Respondent is attached as Appendix B.)

Jurisdiction in the District Court was based on 28 U.S.C. § 1332(a). Respondents contend that this Court does not have jurisdiction due to the failure of Petitioner to timely file its Petition. This Response to the Petition is filed pursuant to this Court's Order, but without waiving the previous objection.

STATUTES INVOLVED

This Petition involves the Due Process clause of the Fifth and Fourteenth Amendments.

STATEMENT OF THE CASE

This appeal involves seven consolidated suits alleging personal injury and death resulting from exposure to asbestos contained in products manufactured and sold by the Petitioner. The basis of the underlying claims are strict liability/failure to warn and gross negligence. All other defendants except The Celotex Corporation settled prior to verdict. After a lengthy trial the jury rendered a verdict in favor of the Respondents awarding compensatory and punitive damages. After extensive post-

verdict motions, the District Court entered judgment based upon the jury verdict for the Respondents.

Respondents have no way of verifying Celotex' post-verdict assertions regarding the number of pending lawsuits or prior punitive and/or compensatory awards.

This appeal involves specific allegations of misconduct by this defendant as it relates to specific individuals. The jury properly awarded damages based solely upon the conduct of this defendant as it related to each individual. Celotex was not and has not been punished for the same course of conduct for all injured individuals.

During the trial one of the Respondents, Mary Marble, in compliance with the Standing Order for Asbestos Cases in the Eastern District of Texas, introduced a "product list" prepared by her husband prior to and with knowledge of his impending death. Celotex relied upon the "product list" to prove its claim for contribution against other manufacturers and unamibuously judicially admitted that Mr. Marble was exposed to asbestos from its products. Celotex *voluntarily* admitted this material fact although evidence existed in the record from a co-worker that Mr. Marble was not exposed to Celotex' products. The unequivocal and unambiguous statement made by counsel to the fact finder during trial is without question binding upon Celotex.

REASONS WHY THE PETITION SHOULD BE DENIED

The Petition should be denied because it was not timely filed pursuant to Rule 13.4 of the Rules of the Supreme Court and 28 U.S.C. § 2101(c).

Furthermore, the Texas Constitution and Texas common law provide for due process guarantees in the assessment of punitive damages. The instructions of the District Court and post-verdict review by the District Court and Appellate Court exceed the standards approved by this Court in *Pacific Mutual Life Insurance Company v. Haslip*, 111 S.Ct. 1032 (1991).

In addition, the Fifth Circuit Court of Appeals properly held that statements made by counsel constitute a judicial admission. No conflict exists between the Opinion of the Fifth Circuit and authorities cited by the Petitioner, because the facts are clearly distinguishable.

I. THE TEXAS CONSTITUTION AND TEXAS COMMON LAW HAVE ESTABLISHED A PLAINTIFF'S RIGHT TO RECOVER PUNITIVE DAMAGES AND PROVIDE SUFFICIENT DUE PROCESS SAFEGUARDS FOR THE IMPOSITION OF A PUNITIVE DAMAGE AWARD.

The Texas Constitution clearly provides and establishes the right to recover punitive damages. Article 16, Section 26 provides:

> Every person, corporation, or company that may commit a homicide, through a willful act or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body, or such of them as there may be . . .

TEX. CONST., art. 16, § 26.

In product liability and gross negligence actions, Texas Courts and the United States Court of Appeals for the Fifth Circuit construing Texas law have repeatedly held

that a plaintiff is entitled to recover exemplary damages where the acts of a defendant demonstrate that it was consciously indifferent to the plaintiff's welfare and safety. *Burk Royalty v. Walls*, 616 S.W.2d 911 (Tex. 1981); *Rawlings Sporting Goods Co., Inc. v. Daniels*, 619 S.W. 2d 435 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.); *Heil Co. v. Grant*, 534 S.W.2d 916, 926 (Tex. Civ. App. —Tyler 1976, writ ref'd n.r.e.); *Aguirre v. Armstrong World Industries, Inc.*, 901 F.2d 1256 (5th Cir. 1990); *Hansen v. Johns-Manville Products Corp.*, 734 F.2d 1036 (5th Cir. 1985); *Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1371 (5th Cir. 1982), *appeal after remand*, 722 F.2d 1238 (5th Cir. 1984), *modified, rehearing denied*, 727 F.2d 350.

Moreover, the Fifth Circuit, construing Texas law, in considering the same challenge of multiplicity of punitive damage awards in asbestos litigation has held:

> . . . Texas law does not preclude, but, in fact, apparently grants the right to punitive damages awarded in favor of product liability plaintiffs, even in context of mass asbestos litigation with potential for multiple punitive damage awards against a defendant.

Hansen, 734 F.2d at 1036.

Texas common law has embraced the traditional common law approach for assessment of punitive damages. As this Court stated in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1990):

> Under the traditional common law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful con-

> duct. The jury's determination is then reviewed by the trial and appellate courts to ensure that it is reasonable . . .
>
> . . . Since every state and federal court considering the question has ruled that the common law method for assessing punitive damages does not in itself violate due process, it cannot be said that that method is so inherently unfair as to be per se unconstitutional. The method was well-established before the Fourteenth Amendment was enacted, and nothing in the Amendment's text or history indicates an intention to overturn it.

Id., at 1042, 1043.

A complete review of this record demonstrates that the jury was given: (1) clear objective criteria for the imposition of punitive damages; (2) the full panoply of procedural protections; (3) instructions describing the purpose of punitive damages as punishment and deterrence; (4) the instructions required the jury to consider the character and degree of the particular wrong and that the award was not compulsory; (5) the trial court conducted a full post-trial review utilizing established standards to ensure a meaningful and adequate review including the Petitioner's claim of multiple prior punitive damage awards; (6) the appellate court conducted a complete review of the evidence supporting the imposition of punitive damages and whether or not the amount of the award was reasonable utilizing established common law standards. Every possible due process safeguard and protection was afforded this Petitioner.

Texas common law has established certain well-recognized rules for the imposition of punitive damages. First, a plaintiff may not recover punitive damages in the

absence of a specific finding of actual damages. *Nabours v. Longview Savings & Loan Association,* 700 S.W. 2d 901 (Tex. 1985). Second, punitive damages awarded must bear a reasonable proportion to actual damages. *Alamo National Bank v. Kraus,* 616 S.W.2d 908 (Tex. 1981). Third, the trial court and appellate court must review the award of the jury for excessiveness. In making that review, the trial court and the appellate court *must* consider at least the following factors: (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties; and, (5) the extent to which the defendants' conduct offends the public's sense of justice and propriety. *Id.,* at 910. In addition, this trial court specifically reviewed by post-trial motions and affidavits the history of punitive awards as provided by this defendant. (Plaintiffs have no way to verify the accuracy of the defendant's statements post-trial.) A comparison of these Texas standards with the standards in *Pacific Mutual Life Insurance Co. v. Haslip,* 111 S.Ct. 1032, clearly demonstrates that the Texas common law scheme affords sufficient due process protections.

A. Assessment Of Punitive Damages In Asbestos Litigation Relating To Specific Individual Harm Does Not Violate Due Process.

Asbestos litigation began with a single plaintiff seeking recovery for his injuries in the case of *Borel v. Fibreboard Paper Products Corp.,* 493 F.2d 1076 (5th Cir. 1973), *cert. denied,* 419 U.S. 869. The full extent of the death and disease caused by the manufacturers of products containing asbestos such as this Petitioner was not known

at that time by the plaintiff and has still not been fully realized. Only the Petitioner knew the extent of the exposure throughout this country and the thousands it voluntarily and knowingly exposed to asbestos.

This punitive damage award and every punitive damage award has been specifically related to an individual plaintiff. No recovery was ever made on behalf of all that are harmed nor could such an award be assigned. The exposure of individuals occurred over decades. The degree of harm varies from individual to individual from minor disability to death. It is only through the assessment of individual harm and punishment for that individual harm that punitive damages may be awarded. This litigation is unlike most "mass torts", which involve a single catastrophe. This litigation involves individual exposure to individual products by thousands of men and women over decades.

Celotex urges that it is not this particular award that is objectionable but, rather, the combination of past awards and the potential of future awards that violates due process. Thus, it argues, having one punitive damage award against it for one individual, all future plaintiffs' rights should be foreclosed. Such a holding by this Court, on this record, would arbitrarily discriminate between plaintiffs in product liability actions. In essence, such a holding would limit an award for punitive damages to the first plaintiff able to win the race to the courthouse and secure an award, or prohibit punitive damage claims after Celotex selected the award it wanted to pay. Clearly, had one plaintiff sought to recover for all future plaintiffs, Celotex would object that it violated the very Texas standards it complains about in this Petition.

Not only does Celotex' view of due process violate both due process and equal protection principles, it would completely defeat the purpose of punitive damages, which is to punish the wrongdoer and deter further wrongdoing. For example, if an early award of punitive damages, based on an individual's injury, as in these cases, was in the amount of $500, Celotex could voluntarily pay the award and destroy the very purpose of punitive damages. No longer would there be incentive to rectify the harm of defective products through recall, repair or warning. Nor should this Court arbitrarily decide for future "mass torts" at what level punishment is sufficient without any knowledge of the nature of the wrong, the degree of culpability of the parties, the character of the conduct, and the extent to which the defendant's conduct offends the public sense of justice and propriety. Celotex argues that the potential for multiplicity of punitive damage awards should foreclose the right of those injured to recover punitive damages. In essense, its argument is that it injured and caused death in so many people that it should not be punished. A holding by this Court that a manufacturer who causes death in thousands of people is not subject to punitive damages simply because of the magnitude of the harm, completely destroys the policy of deterrence.

Celotex claims that the purpose of punitive damages is negated because its potential liability *may* exceed its ability to pay and that it has now sought protection by voluntarily seeking bankruptcy. Simply because the amount of damages sustained by plaintiffs wrongfully injured *may* exceed the ability of the defendant to pay has never justified *elimination* of the right of recovery or the basis of recovery. No individual or corporation has

the right to protection simply because its conduct was so reprehensible that it consciously and intentionally caused death and disease in 65,000 people. The conduct of Celotex consists of multiple acts over several decades against thousands of individuals. The amount of damages awarded *in this action* is specifically related to the amount of individual damage by each plaintiff.

The simple fact is that Celotex could have introduced evidence of prior awards paid in punitive damages for the jury's consideration and urge that it had been sufficiently punished. Instead, it chose not to tell the jury of any previous punitive award payment and then complained upon appeal that the award of this jury was unjust because of prior awards.

Celotex by affidavit, post-trial, demonstrated only that two prior punitive damage awards had been paid in a 1981 case and a 1984 case for a total of $175,000. This type of evidence has been rejected by the Second Circuit as failing to make an adequate record in the trial court to support a due process challenge. *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277 (2nd Cir. 1990), *cert. dismissed,* 111 S.Ct. 27, 111 L.Ed.2d 840; *Johnson v. The Celotex Corporation,* 899 F.2d 1281 (2nd Cir. 1990), *cert. denied,* 111 S.Ct. 297, 112 L.Ed. 2d 250; *Racich v. Celotex Corp.*, 887 F.2d 393 (2nd Cir. 1989).

In *Johnson v. The Celotex Corporation,* 111 S.Ct. 297, Celotex and another manufacturer, Owens-Illinois, appealed an adverse judgment presenting this precise argument. Celotex offered no evidence of the amount of punitive damages paid. However, Owens-Illinois advised the Court it had paid $554,194 in punitive damages,

which is in excess of three times the amount Celotex now claims it has paid. The Second Circuit—in an Opinion that this Court, after reviewing, refused Certiorari—wrote, "there has been insufficient proof to demonstrate an *unjust result* of multiple imposition of punitive damages for the same course of conduct." *Id.*, at 1287. The Court continues, stating, "The record here simply is insufficient to permit an examination of the claim that there is a multiple award of punitive damages offensive to the fundamental fairness inherent in due process." *Id.*, at 1287. 1288. Such is the scenario now before this Court. The Petitioner, Celotex, has simply failed to maintain and present an adequate record that will support its due process arguments.

B. The Texas Constitution, Common Law And Gross Negligence Provide Specific Criteria Which Fairly Apprised Celotex That Its Conduct Would Subject It To Punishment And Does Not Violate Due Process.

Celotex, incredibly, argues that Texas law did not apprise or warn it that if it caused death by a willful act or omission it would be responsible for punitive damages. As previously demonstrated, the Texas Constitution clearly provides for exemplary damages under these facts. Additionally, the previous Constitution of 1869 in Texas included a similar provision making every person or corporation that might commit a homicide through a willful act or omission responsible in exemplary damages. This constitutional provision was in effect in Texas approximately 50 years before Celotex first manufactured and sold its products.

In spite of the constitutional provision, Celotex urges that it was not warned because product liability law was not adopted in Texas until 1967. Celotex' argument ignores the basis of the punitive award—gross negligence and the Texas Constitution. It is the Texas Constitution and the grossly negligent conduct of Celotex that is the basis of the punitive damage award. The right of action of gross negligence existed in common law and Texas law long before Celotex engaged in this conduct.

Celotex complains that the Trial Court's instructions fail to define the conduct. However, a review of the instructions demonstrates a clear definition of the objectionable conduct and adequate standards for the imposition of punitive damages. The Court instructed the jury, as follows:

> The plaintiffs claim that the acts (previously defined) of each of the defendants was done *willfully, intentionally,* or *with a callous or reckless* disregard and indifference to the rights and welfare of the plaintiffs, and that such conduct entitles them to an award of punitive damages *in addition* to the compensatory damages.
>
> I instruct you, that under the laws of Texas, a heedless and reckless disregard means more than a momentary thoughtlessness, inadvertence or error of judgment. It means such an entire want of care as to indicate that the act or omission in question was the result of conscious indifference to the rights, welfare or safety of the persons affected by it. In their claim for punitive damages, the plaintiffs claim, generally, that the defendants acting individually, or in conjunction with or in conspiracy with other asbestos manufacturing companies, *willfully, intentionally,* or with *reckless indifference, withheld from*

> *the plaintiffs* as well as from the public in general, *information* as to the dangers and potentially deadly nature of asbestos products, long after each of the defendants had *actual knowledge* of the dangers connected with the use of its products.
>
> The plaintiffs also contend that this action on the part of the defendant, either individually or collectively, continued for many years and was *knowingly* designed by each of the defendants to cause the plaintiffs and their household members and other similarly situated workers to remain ignorant of the nature of their asbestos products.
>
> If you find for the plaintiffs, and if you further find that any of the defendants did act with *malice, willfulness, intentionally* or with a *heedless and reckless* disregard or indifference to the rights of others, the law would allow you, *in your discretion,* to assess punitive damages against the defendant as *punishment and as a deterrent to others.*
>
> In making your determination as to punitive damages, you will *consider the totality of the circumstances* and that you *may consider the financial resources of the defendant in fixing the amount of such damages.*

(Tr. Vol. X, pp. 2488-2491), emphasis added.

Clearly, these instructions go far beyond those given in *Pacific Mutual Life Ins. Co. v. Haslip,* 111 S.Ct. 1032. The instructions specifically state objective criteria for the imposition of punitive damages, specifically outline the conduct which supports the award, specifically state that any award is discretionary, specifically instructs the jury to consider the totality of the circumstances, specifically state that the purpose of punitive damages is punish-

ment and deterrence, and finally, in accordance with Texas law, allows the jury to consider the financial resources of the defendant in fixing the amount. Clearly, these instructions satisfy the due process requirements.

C. The District Court's Award Of Punitive Damages Was Governed By Sufficient Guidelines And Does Not Violate Due Process.

Contrary to the assertions of Celotex, Texas common law, as previously demonstrated, provided for *fundamental fairness and safeguards* in the award of punitive damages. As previously demonstrated, the jury was fully and fairly instructed concerning gross negligence and the imposition of punitive damages. The trial court and appellate court completely reviewed the underlying evidence and the amount of the award utilizing traditional common law standards. Additionally, both the trial court and the appellate court reviewed Celotex' claim that previous punitive awards should prohibit the imposition of this award.

Clearly, the lower courts recognized that the recovery of punitive damages is an individual right and that these awards were awarded based upon specific individual harm. Celotex chose to present evidence of prior awards in post-verdict motions. The sole evidence was by affidavit, after verdict, without any discovery, cross-examination or investigation concerning the truth of these assertions. The lower courts, after reviewing all of the evidence and instructions upheld the jury verdict. All of the safeguards of due process and Texas law have been afforded this defendant.

II. CELOTEX JUDICIALLY ADMITTED EXPOSURE BY ALBERT MARBLE TO ITS PRODUCTS AND COMPETENT EVIDENCE OF EXPOSURE EXISTS IN THE RECORD.

The "product list" prepared by Albert Marble pursuant to the Standing Order in Asbestos Cases in the Eastern District of Texas was properly admitted into evidence pursuant to FED. R. EVID. 1006, FED. R. EVID. 804(b)(2) or FED. R. EVID. 804(b)(5).

By order dated July 7, 1982, the Federal Courts in the Eastern District of Texas require in all cases that claim damages as a result of exposure to products containing asbestos that a plaintiff furnish by answer to interrogatory each asbestos product he was exposed to, including the identity of the manufacturer, the identity of the particular product at each place of employment, and to state, in detail, when and where he was exposed to each product. There are 25 potential manufacturers and hundreds of products for which he is required to provide this information. The product list is always admitted into evidence for the purpose of proving exposure. The product list is admissible pursuant to *Moore v. Johns-Manville Sales Corp.*, 781 F.2d 1061 (5th Cir. 1986) and FED. R. EVID. 1006.

Mr. Marble worked in the insulation business for numerous contractors throughout his career. His employment required him to travel "wherever the job was." (Tr. V, p. 1130) He lived in many states, including Mississippi, Florida, Georgia, Alabama, North Dakota, Utah, Nevada, New Mexico, Texas and many others. (Tr. V, p. 1130) He worked on more than 80 different job sites throughout the country. (Tr. V, pp. 1145-1146)

Mr. Marble was diagnosed in 1985 with malignant mesothelioma. Prior to his death, he answered the interrogatories of the defendants under oath and in compliance with the Court's standing order. In the fall of 1985, he and Mrs. Marble began compiling his work history and product list in response to the request of this defendant and 24 other asbestos manufacturers. Mr. Marble began compiling the information *after being told of his condition and with full knowledge of his impending death. He actually made the list himself.* When he became too tired or weak to write the information down, Mrs. Marble would write it down for him. (Tr. V, pp. 1144-1145)

Mr. Marble completed the list before his death in January, 1986. (Tr. V, p. 1145) Mrs. Marble testified that the list was *his list; his product;* and that *he was preparing it for this lawsuit,* as required by the defendants and the Court Order. (Tr. V, p. 1146) She also testified that at the time he was preparing the list, he knew his death was imminent.

Mrs. Marble testified that she asked her daughter, Julie, to type the list so that it would be in more legible form. After the list was typed, Mrs. Marble and Julie compared the two lists to ensure accuracy. (Tr. V, p. 1145) Unfortunately, when Mrs. Marble submitted the typed list, she threw away the handwritten list. (Tr. V, p. 1193) It is the typed list with this explanation which was admitted into evidence for the jury's consideration.

The product list of a plaintiff is, without question, the single most complete and probative piece of evidence available concerning a plaintiff's work history and product use. It is generally prepared by the plaintiff in his own handwriting and then typed so that it will be in a legible form for the jury.

A. Celotex Did Judicially Admit Exposure.

Celotex fails to state in its Petition that plaintiffs offered two forms of evidence to show the asbestos products to which Albert Marble was exposed: the deposition testimony of a co-worker, Joseph William Cameron (Tr. V, pp. 1064-1071), and a "product list" prepared by Mr. and Mrs. Marble pursuant to Court Order dated July 7, 1982 of the Federal Courts in the Eastern District of Texas.

Interestingly, Celotex does not inform this Court that Mr. Cameron, a co-worker, was specifically asked if Mr. Marble was exposed to products manufactured by Celotex or Philip Carey. Mr. Cameron testified that he had first met Mr. Marble in 1943 (Tr. V, p. 1066) and that he worked on numerous jobs with Mr. Marble and named some of them (Tr. V, p. 1060). In response to a question concerning exposure of Mr. Marble to specific manufacturers' products, *Mr. Cameron denied that Mr. Marble used products manufactured by Celotex/Philip Carey.*

Celotex never made reference to this testimony concerning exposure to its products. It never asked the jury to consider this sworn testimony of a long-time co-worker concerning whether or not Mr. Marble was exposed to its products. Celotex never suggested this testimony was more credible, trustworthy or believable than the product list prepared by Mr. Marble pursuant to Court Order. Celotex never suggested that Mr. Marble fabricated the list or that the list should not be relied upon by the jury in answering either the exposure or contribution issues.

Instead, Celotex, at a crucial stage of trial, before the "fact finder" candidly admitted:

> Question 2 is were they exposed to our products? And, of course, the answer to that one was "Yes," and I agree with that. (Tr. X, p. 2400)

Celotex went further and relied upon the very same product list to prove contribution against other manufacturers. The burden of allocating causation rested with Celotex, not the plaintiffs. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984). On the issue that Celotex had the burden of proof, it did not rely on the deposition of the long-time co-worker but, rather, implored the jury to rely on the product list of Mr. Marble.

> We would like you to look at the job list and product list of each one of these plaintiffs, to *determine whether or not they were exposed.*
>
> You will be asked to determine a *percentage of responsibility to the various defendants,* and I would ask that you count those up and take a look at all the different jobs these people have worked with these products on . . . that at least they should be held at least 10 percent liable or have 10 percent responsibility assessed to each and every one of them. And *Celotex* should have no more than 10 percent assessed in our judgment.

(Tr. X, p. 2448).

The jury did just what Celotex told it to do. In the case of Mr. Marble, instead of following the co-worker's testimony, it found eleven other manufacturers' products that he was exposed to and assigned a percentage finding against ten of them.

The fact is, that Celotex admitted before the jury, in open Court, during trial that Mr. Marble was exposed to its products. Additionally, Celotex utilized the product

list as a specific mode of evidencing exposure to other manufacturers' products for its claim for contribution. Both actions constitute judicial admissions by Celotex of the fact that Mr. Marble was exposed to its products.

Wright and Graham address judicial admissions and quote Wigmore for the definition:

> A requirement for evidence ceases to apply where the opponent, by *express statement* made *for the purpose of trial,* has
>
> 1) Conceded the truth of a fact; *or*
>
> 2) Assented to a specific mode of evidencing it.

22 C. WRIGHT, K. GRAHAM, FEDERAL JUSTICE AND PROCEDURE § 5194 (1978) (footnote omitted). The conduct of Celotex' counsel during trial meets both of these definitions. There is no dispute in the law that an unambiguous admission by counsel in the course of trial is binding on its client. *Oscanyan v. Arms Co.,* 103 U.S. 261, 26 L.Ed. 539 (1880). Contrary to the assertions of Celotex, there is no conflict between this decision and decisions of other circuits. As will be demonstrated, the opinions relied upon by Celotex to "create" a conflict are clearly distinguishable from this case.

Celotex urges that its counsel, during jury argument, did not make a judicial admission but, rather, was simply arguing *the record as it existed at the time of submission.* The assertion by Celotex is far from the truth. The record contained affirmative proof by a co-worker that Mr. Marble was not exposed to Celotex products. The record, additionally, contained all of the circumstances surrounding the making of the product list and the facts concerning how the original handwritten list was destroyed.

Instead of arguing that record and testimony, Celotex made the conscious and voluntary decision *to admit exposure to its products.* Furthermore, it relied on the trustworthiness and accuracy of the product list to prove contribution and made no attempt to elicit any other testimony from co-workers concerning contribution. It assented to, acquiesced in, relied upon and benefitted from the product list.

Celotex argues *Clark v. City of Los Angeles,* 650 F.2d 1033 (9th Cir. 1981), *cert. denied,* 456 U.S. 927 (1982), as authority for its position. *Clark* is not authority and does not address the issue before this Court. The issue in *Clark* was whether or not *reference* to a piece of evidence in argument constitutes *waiver* of the original objection. That issue is far different from admitting a *fact* required to be proved. The controversy in *Clark* centered around the admission of a diary written by one of the plaintiffs who began taking notes at the suggestion of a lawyer. The diary chronicled *discussions* with the police, other vendors and city officials, and describes the plaintiff's and other vendors' *feelings* about these encounters. It also contained *non-expert opinion* which was not admissible. It was described by the Court as a *"highly emotive document that does not simply relate factual occurrences,* but is written in a style designed to *arouse sympathy and create enmity for the appellants."* *Id.,* at 1038.

In closing argument, the attorney for the defendant *did not admit an underlying fact to be proved* as Celotex did but, rather, attacked the diary as not being *reliable. Id.,* at 1038-1039. The reference to the diary by counsel for the defendants involved "what the diary did not contain, i.e., lists of merchandise sold or records of

monies collected, the absence of which would tend to show that the *diary was not reliable." Id.,* at 1039.

Plaintiffs, here, admit that Celotex could have challenged the reliability of the product list in argument without waiving its objection. Celotex could have referred to the product list and how it was made without admitting exposure. But, instead, Celotex *admitted exposure and never questioned the reliability of the list before the jury.* Celotex could have chosen to say nothing about Question 2, and would not have admitted exposure. *It could have relied upon the deposition testimony of Mr. Cameron and denied exposure.* But, it didn't. *It chose,* voluntarily, to admit exposure.

Celotex also improperly cites *Hardy v. Johns-Manville Sales Corp.,* 851 F.2d 742 (5th Cir. 1988), for authority. *Hardy* dealt with the question of whether statements made in *appellate briefs* submitted by a party in *one action* may be used against that party in a *different action* between *different parties* deciding *different issues.* This Court properly held under those circumstances the statements contained in *appellate briefs* were not judicial admissions.

In *Hardy,* a product liability action seeking damages, the plaintiffs introduced statements made in appellate briefs by Raymark and Keene in a *different lawsuit* filed in Illinois for declaratory judgment seeking to establish that their *insurance coverage existed.* The prior lawsuits involved interpretation of a contract of insurance by Raymark and Keene and their respective insurers, in "neither of the suits were any of the *Hardy* plaintiffs parties, nor did the suits specifically concern the claims, circumstances, exposures, or injuries of the plaintiffs."

Id., at 745. This Court properly distinguished actual allegations in trial court pleadings and arguments made in appellate briefs.

This appeal does not involve statements made in appellate briefs in a different proceeding with different parties and different issues. Nor does this appeal involve a dispute as to what the trial court record shows. This appeal involves the unequivocal statement, contrary to the interest of Celotex, made by Counsel for Celotex during the same trial about a fact to be proved by the plaintiffs. No danger of confusion existed before the jury. In fact, the admission by Celotex clarified the positions of the parties concerning a material fact which could have been in dispute for the jury to determine. Counsel for Celotex was not attempting to argue the trial record but, rather, admitted the exposure of Mr. Marble.

In *Childs v. Franco,* 563 F.Supp. 290 (E.D. Pa. 1983) a United States District Court held defense counsel's statements made during closing argument constituted a judicial admission. Citing *Glick v. White Motor Company,* 458 F.2d 1287, 1291 (3rd Cir. 1972) and other cases, the Court held:

> If unequivocal, an admission of counsel during the course of trial is binding on the client.

Childs, 563 F.Supp. at 292. The Court found the admission by defense counsel related to a question of fact. The statement made was unambiguous. Similarly, it is difficult to imagine how statements made by counsel for Celotex can be any more clear or unambiguous:

> Question 2 is were they exposed to our products? *And, of course,* the answer to that one was "Yes," *and I agree with that.*

(Tr. Vol. X, p. 2400). Clearly, Celotex admitted a material fact during trial and is bound by the judicial admission.

CONCLUSION

The Texas Constitution and Texas common law clearly grant a plaintiff the right to recover punitive damages. Furthermore, Texas common law has adopted the common law method of assessing punitive damages. The jury was properly instructed concerning punitive damages and the trial court and United States Court of Appeals for the Fifth Circuit carefully reviewed the jury award pursuant to those established standards. All due process guarantees and safeguards have been given to this defendant.

Celotex clearly and unambiguously judicially admitted an underlying fact to be proved before the fact finder during trial. Celotex voluntarily chose to admit the fact and utilized the product list to prove its claim for contribution. It voluntarily chose to ignore contrary proof in the record. Additionally, the product list was competent evidence proving exposure and was made pursuant to the Standing Order in the Eastern District of Texas.

Plaintiffs respectfully request that this Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

PAUL L. SADLER
Counsel of Record

REX HOUSTON
WELLBORN, HOUSTON, ADKISON, MANN, SADLER & HILL
300 West Main Street
Henderson, Texas 75652
903/657-8544
903/657-6108 (fax)

Attorneys for Respondents

APPENDIX A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

February 25, 1991

Mr. Robert Hayden Burns
Butler & Binion
1600 First Interstate Bank Plaza
Houston, TX 77002-5008

RE: *Celotex Corporation v. Lloyd D. King, et al.*

Dear Mr. Burns:

Your petition for a writ of certiorari in the above-entitled case, mailed from Houston on February 11, 1991 was received February 19, 1991 and must be returned as out of time.

Inasmuch as the Court of Appeals for the Fifth Circuit denied a petition for rehearing on August 31, 1990, it would appear that the time to file a petition in this Court expired November 29, 1990 which was ninety days after the denial of rehearing. See Rule 13.4 of the Rules of the Supreme Court and 28 U.S.C. § 2101(c). This office is unaware of any provision in Title 11 of the United States Code that would operate to suspend 28 U.S.C. § 2101(c) with respect to the timely filing of a petition for a writ of certiorari in a civil matter by a debtor. Section 3 of Judge Baynes order of January 10, 1991 has been noted, but it is unclear how such order can be squared with 28 U.S.C. § 2101(c).

Accordingly, your petition and check in the amount of $300.00 must be returned pursuant to Rule 13.3 of the enclosed Rules of the Court.

Very truly yours,

WILLIAM K. SUTER, Clerk

by
Francis J. Lorson
Chief Deputy Clerk

Enc.

cc: Paul L. Sadler
Clerk, United States Court of Appeals
for the Fifth Circuit (Your No. 89-2640)
Clerk, Bankruptcy Court of the United States
District Court for the Middle District of
Florida (Your No. 90-10016-8B1)

APPENDIX B

WELLBORN, HOUSTON, ADKISON, MANN,
SADLER & HILL
ATTORNEYS AT LAW
HENDERSON, TEXAS 75653-1109

March 13, 1991

Mr. William K. Suter, Clerk
Supreme Court of the United States
One First Street Northeast
Washington, D.C. 20543

Attn: Francis J. Lorson, Chief Deputy Clerk
Re: The Celotex Corporation v. Lloyd D. King, et al
Dear Mr. Suter:

This letter is being sent in response to the letter dated March 8, 1991, which was directed to you by Mr. Robert Burns, counsel of record for the Celotex Corporation.

The Celotex Corporation maintains that 11 U.S.C. § 108(c) extends the mandatory appellate timetables for filing a petition for writ of certiorari contained in 28 U.S.C. § 2101(c). There is no controlling case law nor authority which holds or even suggests that 11 U.S.C. § 108(c) is to be construed in such a manner. The Celotex Corporation is, quite literally, asking you to formulate new law with regard to the construction of 11 U.S.C. § 108(c).

Subsection (c) extends, in particular, various statutes of limitation *for the benefit of creditors. See* 11 U.S.C. § 108 (bound edition) "Historical and Revision Notes"; *see also, In Re: Davidson,* 120 B.R. 777 (Bankr. N.J. 1990) and *Bain v. Bain,* 64 B.R. 581 (W.D. Va., Roanoke Div. 1986), and J. Patchan, Federal Rules of Bankruptcy, Part IV, The Debtor: Duties and Benefits—Rule 4006 "Notice of No Discharge," 1983 Advisory Committee's Notes (1989).

The tolling power of Section 108(c) inures to the benefit of the creditors of the bankrupt debtor. *See* 11 U.S.C. § 108, Notes of Decisions, Note 8. This premise is emphasized in *Morton v. National Bank of New York City*, 866 F.2d 561 (2d Cir. 1989), where the Court stated:

> "Recognizing that a petition in bankruptcy could sometimes give a debtor unfair advantage over a claimant by allowing the debtor to remain under the protection of the automatic stay until the limitation period governing the claimant's action had expired . . . Congress acted to solidly preserve the rights of a party 'stayed from commencing or continuing an action against the debtor because of the bankruptcy case.' "

Id. at 566.

This was the type of inequity Congress was seeking to remedy when it enacted Section 108(c). *See* 2 Collier on Bankruptcy ¶ 108.04 (L. King 15th ed. 1988); *see also*, Pub. L. 98-353, U.S. Code Cong. and Adm. News 1984, p. 576 and Pub. L. 99-554, U.S. Code Cong. and Adm. News 1984, p. 5227, and U.S. Code Cong. and Adm. News 1978, p. 5787.

In Re: APC Construction, Inc., et al v. Hinesburg Sand and Gravel, Inc., et al, 112 B.R. 89 (Bankr. D. Vt. 1990), also stands for the proposition that Section 108(c) extends any applicable non-bankruptcy law for the benefit of the creditors and re-emphasizes that this was the purpose of Congress in enacting this section. The aforementioned cause contains numerous legislative history references which reinforce this interpretation. *See also, In Re: Hunters Run, Limited Partnership*, 875 F.2d 1425, 1429 (9th Cir. 1989) and *Hazen First State Bank v. Speight*, 888 F.2d 547, 577 (8th Cir. 1989).

Section 108(c) of Title 11 does not and was never meant to alter the appellate timetables for appeals directed to the Supreme Court of the United States. The language contained in 28 U.S.C. § 2101(c) is mandatory and states that any writ of certiorari *shall* be taken or applied for within 90 days after the denial of the re-hearing (in this particular case). This statutory axiom is emphasized in *Missouri, et al v. Jenkins*, 110 S.Ct. 1651 (1990) where the Supreme Court stated that "[t]his 90-day limit is mandatory and jurisdictional." *Id.* at 110 S.Ct. 1660. The language of 28 U.S.C. § 2101(c) is clear and unequivocal—only a Justice of the Supreme Court may extend the time for applying for a writ of certiorari. This is the procedural avenue Celotex should have pursued if it desired to preserve any rights of appeal.

In summation, the Celotex Corporation is asking your office to interpret 11 U.S.C. § 108(c) in a manner in which it has heretofore never been interpreted. If your office accepted and filed Celotex's petition for writ of certiorari, Section 108(c) would—for the first time—operate in favor of the bankrupt debtor to suspend a statutory timetable for appeal to the Supreme Court of the United States.

With all due respect to the office of the Clerk of the Supreme Court of the United States, we ask you to refrain from acting in a judicial and/or legislative capacity and to reject Celotex's petition for writ of certiorari as untimely.

Yours very truly,

/s/ REX HOUSTON
For the Firm

RH/j

cc: Robert Hayden Burns